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Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1254.

JOSEPH SMITH, SHERIFF OF WORCESTER COUNTY,
Appellant,
v.
VALERIE GOGUEN,
Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO AFFIRM.

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Supreme Court of the United States.

October Term, 1972.

No. 72-1254.

JOSEPH SMITH, Sheriff of Worcester County,
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v.
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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO AFFIRM.

The appellee moves, pursuant to Rule 16, that the Court affirm the judgment of the United States Court of Appeals for the First Circuit on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

Question Presented.

Whether the questions presented by this appeal are so unsubstantial as not to need further argument.

Statement.

This is an appeal by Joseph Smith as he is the Sheriff of Worcester County from a judgment of the United States Court of Appeals for the First Circuit affirming an order and judgment of the District of Massachusetts discharging Valerie Goguen from a sentence imposed by the Superior Court of the Commonwealth of Massachusetts for Worcester County. Goguen was found guilty after a jury trial in the Worcester County Superior Court of violation of Massachusetts General Laws, c. 264, § 5,[1] and sentenced to a term of six months in the Worcester County House of Correction.

The material evidence presented at the jury trial was that Goguen was twice observed by police officers of the town of Leominster, Massachusetts, to be in public view with a small cloth American flag sewn to the seat of his pants. When one police officer questioned Goguen about the flag, the other persons present were laughing.

On appeal, the Supreme Judicial Court of Massachusetts affirmed the conviction. *Commonwealth* v. *Goguen*, Mass. Adv. Sh. (1972) 303, 279 N.E. 2d 666. Thereafter Goguen filed a petition for a writ of habeas corpus in the District Court (Jurisdictional Statement, 4, 5).

The Questions Presented are Unsubstantial.

A. The Court Below Properly Considered Goguen's Claim that Massachusetts General Laws, C. 264, § 5, is Unconstitutionally Vague on its Face.

The appellant asserts in his jurisdictional statement that the United States Court of Appeals for the First Circuit improperly considered Goguen's claim that G.L. c. 264, § 5,

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[1] The statute is set out in full at Jurisdictional Statement, 3, 4.

is unconstitutionally vague on its face on the ground that this issue was not fully presented to or considered by the Massachusetts Supreme Judicial Court (Jurisdictional Statement, 5, 6). Whatever criticisms the appellant levels at Goguen's brief in the Supreme Judicial Court, it is clear that that Court did consider and reject a claim of facial unconstitutionality.[2]

> "We reject his claim that the statute is on its face or as applied to him a restraint upon the right of freedom of speech guaranteed by the First Amendment to the Constitution of the United States." *Commonwealth* v. *Goguen*, Mass. Adv. Sh. (1972) 303, 279 N.E. 2d 666, 667 (1972).

Indeed, it is ironic that the appellant now seeks to make this argument, which was not presented to either the Court of Appeals or the United States District Court. Apparently the appellant has confused the Court of Appeals' exhaustive discussion of Goguen's standing to raise the question of facial unconstitutionality with the totally separate issue of whether such a claim was presented to the State Court (see Jurisdictional Statement, Appendix A, 24-33).

Further discussion of this point is obviated by the opinion of the United States District Court in this case. That Court reviewed Goguen's claims including one as to facial unconstitutionality and found as follows.

> "No contention is now made that the petitioner has not exhausted state remedies, not that the constitutional issues presented here were not raised appropriately in state proceedings." *Goguen* v. *Smith*, 343 F. Supp. 161, 164 (D. Mass. 1972).

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[2] We do not concede that the issue of facial unconstitutionality was not adequately argued before the Massachusetts Supreme Judicial Court.

The appellant also seems to misapprehend the decision of the Court of Appeals. It is submitted that that Court found, as did the District Court before it, that G.L. c. 264, § 5, is unconstitutionally vague both on its face and as applied to Goguen since the two considerations are merged within the factual content of this case, without regard to the First Amendment.

> "We do not see how the statute could be so interpreted as to cover appellee and exclude others who place the flag in odd positions, or in conjunction with depreciatory symbols, gestures or slogans, or who merely display it while acting out or speaking that which many Americans might consider obnoxious. Additionally, the statute's words make it clear that the Massachusetts legislature did not intend to confine maltreaters of the flag to those who mutilate, trample upon, or deface the flag, but meant to cover separately other types of contemptuous treatment. We therefore conclude that resolution of appellee's challenge to the statute as applied to him necessarily adjudicates the statute's facial constitutionality and we proceed to address appellee's vagueness argument." (Jurisdictional Statement, Appendix A, 28, 29.)

The Court of Appeals also found that the statute was overbroad and unreasonably impinged upon the freedom of speech guaranteed by the First Amendment.

> "Therefore, having found that Mass. Gen. Laws ch. 264 § 5 affects an area which includes a large proportion of First Amendment activities; that it possesses the potential for a substantial number of impermissible applications; and that it is not foreseeable that the statute's unconstitutional applications could be immediately and effectively exercised without continued

interruptions of First Amendment freedoms, we conclude that the statute must fall as overbroad." (Jurisdictional Statement, Appendix A, 48.)

Thus, the opinion of the Court of Appeals as to the overbreadth of the statute is at most a form of "harmless error" in view of its affirmance of the District Court decision.

B. It is Manifest that the Questions on which the Decision of this Cause Depends are so Unsubstantial as Not to Need Further Argument.

The appellant argues that the State has an important interest in imprisoning Goguen for six months because he was seen to have an American flag sewn to the seat of his pants. It is asserted that this interest is to preserve the public peace and to preserve the flag as a symbol of unity on national ideals and purpose. (Jurisdictional Statement, 19).

With respect to the first "interest," it is clear that Massachusetts has gone beyond what is reasonable and necessary to preserve it. All the Circuit Courts and most of the District Courts which have considered the question agree that such a statute is unconstitutionally vague and overbroad, both in apposite factual context. *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Md. 1970) (flying United States flag in positions inferior to that of United Nations flag); *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F. 2d 344 (2d Cir. 1970) (superimposing "peace symbol" on United States flag); *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz. 1970) (burning United States flag); and generally, *Parker* v. *Morgan*, 322 F. Supp. 585 (W.D. N.C. 1971), and *Thoms* v. *Smith* 334 F. Supp. 1203 (D. Conn. 1971). See *Hoffman* v. *United States*, 445 F. 2d 226 (D.C. Cir. 1971).

It is, however, in the second asserted "interest" that the real nature of this statute and this prosecution may be found. It is appalling that the appellant would assert that there is a legitimate state interest in preserving political "unity." By its assertion, the State says that it wishes to punish communication of a political nature *for its content.* The State asserts that it is permissible to use the flag as a symbol of national unity, but to use it to suggest national disunity or dissent will result in imprisonment. This is the very antithesis of the First Amendment. Certainly to claim that a State may compel a show of respect for political orthodoxy is a manifestly unsubstantial claim in view of the long string of decisions of this Court to the contrary.

Those decisions arise in the symbolic speech case of *Stomberg* v. *California,* 283 U.S. 359 (1931), go through the flag salute case, *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), and culminate in the "contemptuous treatment" case of *Street* v. *New York,* 394 U.S. 576 (1969). As this Court said in *Street*:

> "We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, *including those opinions which are defiant or contemptuous.*" 394 U.S. 576, at 593. (Emphasis added.)

It is indeed unsubstantial, in view of the foregoing, for the appellant to assert now that there is a legitimate state interest in preserving national unity through criminal sanctions against those who peacefully disagree.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the appellee's motion to affirm should be granted.

By his attorneys,

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